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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL LAWRENCE DOMENZAIN, JR.,

Defendant and Appellant.

D054863

(Super. Ct. No. SCD212027)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed as modified with directions.

Following a jury trial in which he appeared in propria persona (pro per), Manuel Lawrence Domenzain, Jr., was convicted of rape (Pen. Code,¹ § 261, subd. (a)(2)), forcible sodomy (§ 286, subd. (c)(2)) and kidnapping for rape and robbery (§ 209, subd. (b)(1)). With respect to the rape and sodomy counts, the jury found Domenzain kidnapped the victim (§ 667.8, subd. (a)), the movement involved in the kidnapping

¹ Statutory references are to the Penal Code.

substantially increased the risk of harm to the victim (§ 667.61, subd. (d)(2) and Domenzain used a deadly weapon (§ 667.61, subd. (e).) In a subsequent proceeding, the jury found Domenzain had a prior serious/violent felony or strike conviction (§ 667, subds. (b)-(i)) and had served three prior prison terms (§ 667.5, subd. (b).)

After denying Domenzain's motion to dismiss the prior strike allegation under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero* motion), the trial court imposed a sentence of 52 years to life in prison. The sentence consisted of a term of 25 years to life under the One Strike Law for the rape count doubled to 50 years to life under the Three Strikes Law plus one year each for two of Domenzain's prior prison terms. The court imposed a concurrent term of 25 years to life under the One Strike Law for the sodomy count. The court stayed the life with the possibility of parole sentence for the kidnapping count and nine-year enhancements on the rape and sodomy counts pursuant to section 654. The court dismissed the remaining prior prison term.²

FACTS

On the night of September 2, 1998, T.B., then 19 years old, decided to go to her mother's house. T.B. took the trolley from downtown San Diego to the Grossmont station, where she arrived at about 10 p.m. Because no buses were running at the time,

² On our own motion, we remand the case to the trial court with directions to amend the abstract of judgment to reflect that the stayed sentence on the aggravated kidnapping count (count 3) is life with the possibility of parole. The court shall file the amended abstract of judgment with the California Department of Corrections and Rehabilitation.

T.B. decided to walk the rest of the way to her mother's house. From past experience, she knew the walk would take about three hours.

As T.B. was walking by the Mission Trails Golf Course around midnight, she heard some rustling in bushes near the end of a fence line. A man jumped out from the end of the fence line, grabbed her arm and told her to be quiet. T.B. grabbed the fence with both her hands and began screaming. However, at that time of night, no one else was in the area.

The man moved behind T.B. and held a knife to her sternum while pulling her from the fence. T.B. fell on the sidewalk, and the man punched her in the stomach. The man asked T.B. if she had any money; T.B. replied that she did not. The man rolled her over, and T.B. landed in a ditch on the west side of the fence. The man pushed T.B. up a hill to an area that contained a lot of bushes. At the top of the hill, the man shoved T.B. into a rocky area and told her, "You have a choice. I have to get something from you. Can you take it in the mouth or the . . . pussy or the ass?" T.B. responded, "You don't have to do this. . . . You can run away. I won't tell anybody."

The man unbuckled T.B.'s overalls and pushed them down. He shoved T.B. to her knees and put his penis in her vagina. She fell to the ground, and his penis came out. The man inserted his penis into her rectum. When he was finished, the man instructed T.B. to stay and then ran off into the bushes up the hill.

Throughout the attack, T.B. could not see the man's face. She believed he was about her height, had an Hispanic accent and had very short, shaved hair.

T.B. walked to a market in a small shopping center. The night manager let T.B. use the store telephone to call her mother and then contacted a police officer. The officer drove T.B. to the crime scene and she showed him where the attack took place. The officer later testified the distance from the location where T.B. was initially accosted to the location where she was sexually assaulted was about 30 yards.

The officer then drove T.B. to a hospital where a nurse performed a SART exam. The nurse took multiple swabs of the internal and external vaginal and anal areas.

A criminalist for the San Diego Police Department performed DNA analysis and obtained a DNA profile from one of the rectal swabs. However, the profile did not match anyone in the system. The DNA profile was entered in CODIS, a national computer database used for DNA matching. CODIS is updated with new DNA profiles and searched once a week to find a match. On December 31, 2007, the DNA profile from T.B.'s rectal swab was matched to Domenzain.

Testifying in his own defense, Domenzain denied he raped T.B. Domenzain testified he had consensual sex with T.B. because she was a prostitute working on El Cajon Boulevard whom he paid for sex.

DISCUSSION

Appointed appellate counsel has filed a brief setting forth the evidence in the superior court. Counsel presents no argument for reversal but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible but not arguable issues: (1) whether the statute of limitations had run on the rape, sodomy or kidnapping

counts; (2) whether the trial court erred by denying either of Domenzain's two *Marsden* motions (*People v. Marsden* (1970) 2 Cal.3d 118); (3) whether there was sufficient evidence of asportation to support the kidnapping conviction as well as the special kidnapping allegations attached to the rape and sodomy counts; (4) whether the trial court erred by denying Domenzain's motion to withdraw his pro per status and reappoint counsel; (5) whether the trial court erred by not giving an unanimity instruction on the intent element (rape or robbery) required to convict on the kidnapping count; (6) whether the trial court erred by giving the prosecution's special instruction on the element of asportation in connection with the kidnapping count; (7) whether the trial court erred by denying Domenzain's *Romero* motion; and (8) whether the trial court committed other sentencing errors.

We granted Domenzain permission to file a brief on his own behalf. He has not responded.

A review of the entire record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, including the possible issues referred to pursuant to *Anders v. California, supra*, 386 U.S. 738, has disclosed no other reasonably arguable appellate issue. Competent counsel has represented Domenzain on this appeal.

DISPOSITION

The case is remanded to the trial court to amend the abstract of judgment to reflect that the stayed sentence on the aggravated kidnapping count (count 3) is life with the possibility of parole. The trial court shall file the amended abstract of judgment with the

California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.